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No. 559

IN THE

Supreme Court of the United States

October Term 1948

AMERICAN FIDELITY & CASUALTY CO., INCORPORATED and A. CIMPI EXPRESS LINES, INC.,

Plaintiffs-Respondents

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

JOSEPH CARNICELLI, SEYMOUR WOLFSON by SADIE WOLFSON, as Guardiar ad Litem, SADIE WOLFSON, GLORIA WOLFSON by SADIE WOLFSON, as Guardian ad Litem, SAMUEL GREEN, JUNICE GREEN, by SAMUEL GREEN, her Guardian ad Litem, MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits of ELEANOR GULLBERG, deceased, EDWIN L. WOLF, as Administrator of the Goods, Chattels and Credits of RICHARD FRED WOLF, deceased, WILLIS H. GOLDSMITH, as Administrator of the Goods, Chattels and Credits of BETTY MARIE GOLDSMITH, deceased, CLYDE E. BUTLER, as Administrator of HARRY EDWIN BUTLER, deceased, WILLIAM HERBERT, EARL SHOEMAKER, JOSIAH BETHARDS, GEORGE F. LOKER, as Guardian ad Litem of BEATRICE CAROLINE LOKER, GEORGE F. LOKER, JEAN ELIZABETH MATTHEWS, an infant by ETTA H. MATTHEWS, her Guardian ad Litem, and ETTA H. MATTHEWS, BEATRICE KANDEL, an infant by JUDAH KANDEL, her guardian ad Litem and JUDITH KANDEL, MARY LOU JORGENSON, an infant by FREDERICK E. JORGENSEN, ESTATE OF DOUGLAS P. WINTERBOURNE, deceased, ESTATE OF JEANNE COSGROVE, deceased, and the following infants, JAMES PRENTICE, RICHARD PHLEGING, ALBERT HANSEN, MADELINE DEPUY, SHIRLEY WISEMAN, RICHARD DONNELLY, MARY JOHNSON, GEORGE McPHILLIPS, LEE HASSAN, AUDREY STILLER, WILLIAM MARSHALL and RICHARD HANSEN,

Defendants.

MONROE W. GULLBERG, as Administrator of the Goods, Chattels and Credits which were of Eleanor Gullberg, deceased,

Plaintiff-Respondent

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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Plaintiff-Respondent

—against—

NEW AMSTERDAM CASUALTY COMPANY,

Defendant-Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK.

George R. Fearon, Esq., on behalf of New Amsterdam Casualty Company, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered in the above entitled actions on October 22, 1948, and the order of said Court denying petitioner's motion for reargument thereof entered on November 24, 1948.

Opinions Below.

The opinion of Hon. M. B. Patterson, Trial Judge (Fols. 463-497) was not officially reported. There was no opinion on the part of the majority of the Court in the Appellate Division, but the decision, with the dissenting opinion of Mr. Justice Hagerty (Fols. 1289-1318), is reported at *272 App. Div. 1054.* No opinion was written by the Court of Appeals, but its decision with the digest prepared by the State Reporter is reported at *298 N. Y. 693.*

Jurisdiction.

The jurisdiction of this Court to review this decision is derived from Section 1258 of the Judicial Code as revised, wherein final judgments or decrees rendered by the highest court of a State in which a decision could be had may be reviewed by this Court.

The case involves interpretation of Article 1, Section 8, Clause 3, of the Constitution of the United States (the Interstate Commerce Clause); of Section 215 of the Interstate Commerce Act (49 USCA, §315), and of Section 63-r of Article 3-B of the Public Service Law of the State of New York.

The decision which petitioner seeks to have reviewed was handed down by the Court of Appeals of the State of New York on October 22nd, 1948.

Statement.

These cases were tried together without a jury before Hon. Mortimer B. Patterson in Supreme Court, County of Orange, on October 9-11, 1944, and judgments and orders adverse to petitioner were thereafter granted and entered herein (Fols. 498-503, 248-252). These judgments and orders were affirmed by a decision of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department on November 3rd, 1947, and by the Court of Appeals on October 22, 1948. A motion for reargument or for amendment of the remittitur of the Court of Appeals was denied by that Court by an order entered November 24, 1948.

The facts leading up to this petition may be briefly stated as follows:

On September 25, 1942, a tractor-trailer combination operated by A. Cimpi Express Lines, Inc., carrying a load between Newark, N. J., and Sampson, New York (Fols. 221, 436), collided with a horse-drawn haywagon carrying a group of young people, at a point about two miles west of Goshen, New York (Fols. 899-901), resulting in death and serious injury to a number of passengers in the haywagon.

Subsequently twenty-five of these persons and representatives of those who had been killed obtained final judgments against A. Cimpi Express Lines, Inc., totaling $157,072.63 (Fols. 216-220; 431-435).

Two cases are involved on this petition. The first is the Gullberg case, stipulated to be a test case decisive of all others of like tenor, brought on behalf of the administrator of one of the deceased passengers in the role of an

unpaid judgment creditor under Section 167 of the Insurance Law of the State of New York against petitioner as the alleged insurer of A. Cimpi Express Lines, Inc. (Fols. 1234-1267). The second is a declaratory judgment action commenced by A. Cimpi Express Lines, Inc., and American Fidelity & Casualty Co., Incorporated, the other insurer involved (which has since been permitted to discontinue), against petitioner to determine the extent of the latter's liability. These cases, involving the determination of a single identical proposition of law, have been consolidated for purposes of trial and appeal.

Petitioner, New Amsterdam Casualty Company, for the reasons hereinafter stated, duly advised A. Cimpi Express Lines, Inc., that it disclaimed liability under its policy. (Ex. 11, Fols. 1037, 1038.)

The basic facts underlying petitioner's disclaimer of liability and the basis for the petition herein are as follows:

The petitioner's policy of insurance (Ex. 1) in an amount in excess of the minimum requirements of the Public Service Commission of the State of New York was issued to one William P. Biss, the owner and operator at that time of a single tractor and a single trailer, engaged solely in intrastate commerce within the State of New York (Fols. 770, 771) pursuant to a certificate of the Public Service Commission of that State (Fol. 769). This policy contained the following exclusion (Vol. II, Fols. 39-40):

"EXCLUSIONS

THIS POLICY DOES NOT APPLY:

(a) * * *

(b) * * * while any trailer covered by this policy is used with any automobile owned or hired by the named insured and not covered by like insurance in the company; * * * "

A certificate of this policy (Form 4), as required by the Public Service Law of the State of New York, was filed with the Public Service Commission by petitioner on behalf of Biss (Vol. II, Fols. 81-87), and an endorsement (Form 6) was added to the policy (Vol. II, Fols. 65-75).

Biss thereafter sold the tractor and trailer to A. Cimpi Express Lines, Inc. (Fol. 772), a carrier engaged both in intrastate and interstate commerce, having duly issued certificates already in force, both from the Public Service Commission of the State of New York (Ex. 4), and from the Interstate Commerce Commission (Ex. C), and having filed as prerequisite to the obtaining of each of these certificates a certificate of insurance in another insurer in the required amount specified by each of these Commissions (Ex. B) (Vol. II, Fols. 325-335, 342-348).

The accident in question occurred at a time when the trailer insured by petitioner was being used with a tractor "not covered by like insurance in this company" (Fols. 214, 215, 429, 430).

The crux of this case, therefore, is whether or not petitioner's policy of insurance constituted a "required policy" for A. Cimpi Express Lines, Inc., under the Public Service Law of the State of New York, at the time of the accident. If it was such a "required policy", the above quoted exclusion was rendered inapplicable by the statute. If, as petitioner contends, it was not such a "required pol-

icy'' at that time, the exclusion would be effective and no liability could be imposed upon petitioner.

Since the vehicle was at the time of the accident engaged in an interstate operation under a certificate for which the operator had filed required insurance with the Interstate Commerce Commission, the courts of New York State are in effect holding that that State can require of an interstate carrier engaged in an interstate operation insurance in addition to that deemed adequate by the Interstate Commerce Commission pursuant to the authority granted to it under Section 215 of the Motor Carriers Act of 1935.

Petitioner had issued this policy to cover a specific risk, to wit, the operation of one specified tractor and one specified trailer by William P. Biss in intrastate operations under the jurisdiction of the Public Service Commission of the State of New York. It filed a certificate of its policy with that Commission in order that Biss might procure and maintain his permit for such operations. When Biss sold the tractor and trailer to Cimpi, petitioner endorsed Cimpi's name on the policy. It filed no further certificates (Fols. 1006, 1007, 1173). It charged no additional premium. Petitioner has contended throughout this case that the policy never became a required policy for Cimpi, even in intrastate operations. The adverse decision of the Court of Appeals of the State of New York on that point is, of course, not reviewable by this Court.

It is the further question of whether or not this policy can be a state required policy at a time when the carrier was engaged in an interstate operation, also decided adversely to petitioner by the New York Court of Appeals, that petitioner seeks to have reviewed by this Court.

The Question Presented

Can the State of New York require of an interstate carrier engaged in an interstate operation, liability insurance in addition to that required by the Interstate Commerce Commission as a prerequisite to the issuance of its certificate to the interstate carrier?

Statutes and Regulations Involved

New York State Public Service Law

§63-r. SECURITY FOR THE PROTECTION OF THE PUBLIC

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the commission may require, conditioned to pay within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries or death resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others. The commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file surety bonds, policies of insurance, qualifications as a self-insurer, or other securities or agreements in a sum to be determined by the commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all prop-

erty belonging to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid.

State of New York
DEPARTMENT OF PUBLIC SERVICE
State Division

Insurance Requirements for Truck Operators and Brokers

(as issued October 4, 1938)

1. *Common and Contract Carriers:*

Every motor carrier transporting property for compensation shall secure and maintain and file with this Commission a corporate bond or policy of insurance in a company authorized to do business in this State by the Superintendent of Insurance, or in lieu thereof may file a certificate as provided by General Requirements F and G hereof, covering each motor vehicle so to be operated for the sums hereinafter set forth, conditioned for the payment of all judgments recovered against such motor carrier:

	Minimum Liability
For damages for and incident to death or injuries to one person	$ 5,000
For damages for and incident to death or injuries to two or more persons arising out of the same accident	10,000
For damages for and incident to injuries to or destruction of property—each accident	1,000
For loss or damage to property carried in one motor vehicle	1,000

* * * * *

3. *General Requirements:*

(a) Every bond or policy of insurance shall contain a provision for a continuing liability notwithstanding any recovery thereunder.

(b) Every bond or policy of insurance shall provide that the cancellation thereof shall not be effective unless at least twenty days' notice in writing of intention to cancel has been delivered to the Commission; such cancellation notice shall be in the form hereto attached and marked "Form 1"—Liability Insurance; "Form 2"—Cargo Insurance. If such canceled policy is reinstated notice of reinstatement shall be in the form hereto attached and marked "Form 3."

(c) All renewal policies or bonds shall be filed with the Commission at least twenty days prior to expiration of current coverage.

(d) A tractor or truck, when coupled to a trailer or semi-trailer, shall be regarded as one vehicle.

(e) The Commission will consider applications for permission to establish insurance funds in lieu of filing bonds or policies of insurance. Until such authority is granted bonds or policies of insurance, or certificates evidencing insurance, must be filed. No motor carrier or broker will be exempted from filing evidence or insurance.

(f) In lieu of a bond or policy of insurance, operators may file a certificate evidencing such insurance. The certificate shall be in the form hereto attached and marked "Form 4"—Liability Insurance; "Form 5"—Cargo Insurance.

(g) When a certificate of insurance is filed as provided in requirement (f), there shall be attached to the bond or policy of insurance, an endorsement in the form hereto attached and marked "Form 6"—Liability Insurance; "Form 7"—Cargo Insurance.

(h) When a bond is filed in lieu of a policy of insurance or a certificate evidencing insurance, the bond shall be in the form hereto attached and marked "Form 8"—Motor Carrier Bodily Injury and Property Damage Liability; "Form 9"—Cargo Liability; "Form 10"—Brokers' Surety.

Motor Carrier Act of 1935, §215
(49 USCA, §315)

Security for Protection of Public

No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such cerificate or permit, or for loss or damage to property of others. The Commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belonging to shippers and/or consignees and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights

of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid.

INTERSTATE COMMERCE COMMISSION

Rules and Regulations

Rule I

No motor carrier subject to the provisions of the Motor Carrier Act, 1935, shall engage in interstate or foreign commerce, and no certificate or permit shall be issued to a motor carrier, or shall remain in force unless and until there shall have been filed with and approved by the Commission a surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreements in not less than the amounts hereinafter prescribed, conditioned to pay, within the amount of such surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-insurer, or other securities or agreements any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit, or for loss or damage to property of others; nor shall any common carrier by motor vehicle subject to the provisions of said Act engage in interstate or foreign commerce, nor shall any certificate be issued to such carrier, nor remain in force unless and until there shall have been filed with and approved by the Commission a surety bond, policy of insurance (or certificate of insurance in lieu thereof), qualifications as a self-in-

surer, or other securities or agreements in not less than the amounts hereinafter prescribed, conditioned upon such carrier making compensation to shippers or consignees for all property belonging to shippers or consignees and coming into the possession of such carrier in connection with its transportation service.

Rule II

The minimum amounts referred to in Rule I are hereby prescribed as follows:

A. Motor carriers—bodily injury liability—property damage liability

(1) Kind of equipment	(2) Limit for bodily injuries to or death of one person	(3) Limit for bodily injuries to or death of all persons injured or killed in any one accident (subject to a maximum of $5,000 for bodily injuries to or death of one person)	(4) Limit for loss or damage in any one accident to property of others (excluding cargo)
Passenger equipment (seating capacity):			
7 passengers or less	$5,000	$15,000	$1,000
8 to 12 passengers, inclusive	5,000	20,000	1,000
13 to 20 passengers, inclusive	5,000	30,000	1,000
21 to 30 passengers, inclusive	5,000	40,000	1,000
31 passengers or more	5,000	50,000	1,000
Freight equipment: All motor vehicles used in the transportation of property	5,000	10,000	1,000

B. * * * *

Rule III

The following combinations will be regarded as one motor vehicle for the purposes of these rules, (1) a tractor and trailer or semi-trailer when the tractor is engaged solely in drawing the trailer or semi-trailer, and (2) a truck and trailer when both together bear a single load.

Specifications of Errors to be Urged

The Court of Appeals of the State of New York erred:

(1) In affirming the refusal of the Trial Judge to find as a conclusion of law that A. Cimpi Express Lines, Inc., was engaged in interstate commerce at the time of the accident.

(2) In holding that petitioner's policy of liability insurance could be a required policy for a motor carrier under the Public Service Law of the State of New York at a time when such carrier was engaged in an interstate operation, subject to the jurisdiction and pursuant to the authority of the Interstate Commerce Commission.

(3) In holding that the Public Service Commission of the State of New York can require of an interstate motor carrier engaged in an interstate operation insurance in excess of that specified by the Interstate Commerce Commission.

(4) In affirming the decision of the Appellate Division of the Supreme Court of the State of New York for the Second Judicial Department.

Reasons Relied Upon for Writ

The Court of Appeals of the State of New York has decided adversely to petitioner a federal question of substance not heretofore determined by this Court.

This case involves more than the mere question of whether or not petitioner's policy of liability insurance covered the operations of A. Cimpi Express Lines, Inc., at the time of the accident, and therefore whether or not petitioner is liable to pay the judgments recovered against Cimpi to the extent of its policy limits.

It is fraught with dangers which, if the decision of the Court of Appeals of the State of New York is permitted to stand, may well impair the regulatory powers of the United States over interstate commerce granted by the Constitution of the United States.

In reaching the conclusion that petitioner's policy was applicable and that petitioner was liable, the courts of the State of New York have necessarily decided this larger and more far reaching question of federal import. The Trial Judge commented specifically on the point but decided it adversely to petitioner, upon the authority of *Maurer v. Hamilton*, 309 U. S. 598, hereinafter shown to be distinguishable (Fols. 480-485). Neither appellate court wrote an opinion, but it is implicit in their decisions that they have held the Public Service Commission of the State of New York to have the power to impose insurance requirements upon this interstate motor carrier over and above the insurance requirements specifically prescribed by the Interstate Commerce Commission and therefore that the paramount jurisdiction of the United States Government

over interstate commerce granted by Section 8, Article I of the Constitution of the United States may be infringed upon to this extent by a state.

The granting of this petition by this Court will in no way conflict with its decision in *Lynch v. New York*, 293 U. S. 52, or its decision in *McGoldrick v. Gulf Oil Corporation*, 309 U. S. 2, 414. In fact, the petition herein is presented in accordance with the rules laid down in those cases.

In *Lynch v. New York*, supra, this Court stated that it must appear affirmatively from the record not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it.

We have stated above the federal question presented. From the record it appears that this question was not new to the case in the Court of Appeals. It was raised in petitioner's answer (Fols. 99-107; 324-329). It was presented in its trial brief and commented upon by the trial court (Fols. 480-485). It was offered by petitioner in its requested findings of fact and conclusions of law (Fols. 236, 237, 239-241, 451, 454-455), and again in its briefs, both to the Appellate Division of the Supreme Court and the Court of Appeals.

These courts could not have decided the case adversely to petitioner without casting aside all the defenses raised by petitioner. One of those defenses was the involvement in interstate commerce outlined in detail above.

This case presents the reverse of the situation in *McGoldrick v. Gulf Oil Corporation*, supra, in that there the decision as rendered in favor of the protesting taxpayer could have rested upon an adequate non-federal ground as well as upon the federal ground stated. Conversely, a decision in favor of the comptroller in that case would necessarily have involved the rejection of the taxpayer's contention that the tax involved constituted an illegal interference with and a burden upon foreign commerce.

In the instant case, a decision in favor of petitioner could have been sustained on purely state grounds, independent of the federal question here presented, but the decision against petitioner could not have been reached without dismissing its defense based upon the federal ground stated.

That petitioner's request for an amendment of the remittitur to the Court of Appeals of the State of New York to specifically state the federal question was denied certainly cannot be held to preclude the petitioner from obtaining a review of that decision by this Court. It would indeed be an anomalous situation if a state court could, by failing to write an opinion and by thereafter refusing to specifically state a federal question as clearly presented by the record as is this, prevent this court from reviewing its decision.

As to the merits of petitioner's case, it is a well established rule of law that the jurisdiction of the Federal Government over interstate commerce is paramount; that when Congress speaks on any phase thereof, no state can direct to the contrary. (*New York Central Railroad Co. v. Winfield*, 244 U. S. 147, 148, and cases cited there.) This is a

case in which Congress has spoken on the particular phase of interstate commerce concerned.

That interstate commerce is involved is clear, despite the fact that the Trial Judge refused to so find at petitioner's request. He found as a fact that the tractor-trailer combination involved was en route from Newark, New Jersey, to Sampson, New York. That in itself necessitates a determination that the carrier was engaged in interstate commerce. But further, even though there was some debate at to whether any part of the load was picked up at Newark, N. J., or whether on the other hand the carrier was merely transporting a load picked up in Brooklyn, N. Y., to Sampson, N. Y., on a route through New Jersey, interstate commerce was definitely involved, as this Court so ably stated most recently in *Central Greyhound Lines, Inc. v. Mealey*, 334 U. S. 653, an appeal from this same Court of Appeals of the State of New York, when it said:

> "It is too late in the day to deny that transportation which leaves a State and enters another State is 'commerce * * * among the several states' simply because the points from and to are in the same state."

Maurer v. Hamilton, 309 U. S. 598, does not conflict with the decision sought by petitioner herein. There this Court was called upon to determine the constitutionality of the Pennsylvania statute prohibiting the carrying of any other vehicle "above the cab of the carrier involved" as applied to an interstate transporter of motor vehicles. This Court held that such a regulation could be legally imposed upon interstate as well as intrastate carriers, but this Court was careful to point out that upon this particular topic,

namely, whether or not carrying a vehicle over the cab of a transporter vehicle, constituted a danger to the public safety had not been ruled upon by Congress or by the Interstate Commerce Commission. On the contrary, this Court stated that Congress had merely authorized an investigation by the Interstate Commerce Commission into the propriety of issuing safety regulations in this regard. Consequently, the decision of this Court in that case rested upon its conclusion that Congress had not spoken upon the particular phase of the interstate commerce involved and that until it did, the State regulation might legally be applied.

The appellate courts of several states have held their states powerless to impose upon an interstate carrier insurance requirements in addition to or different from those prescribed by the Interstate Commerce Commission, once Congress through the Interstate Commerce Commission had prescribed such requirements. (*University Overland Express, Inc. v. Alsop*, 122 Conn. 275, 189 A. 458; *University Overland Express, Inc. v. Griffin*, 89 N. H. 395, 200 A. 390; *Apger v. New York Central R. R.*, 310 Mass. 495, 38 N. E. 2d 652.

On the foregoing pages petitioner has outlined the federal question involved herein, and has shown that the decision thereof was necessary to the determination of the case by the state courts, that the question had been presented to each of the state courts which decided it adversely to the petitioner, and that this question of federal law, clearly of the greatest importance, though decided by many state courts in a manner favorable to petitioner, has not yet been settled by this court.

Conclusion.

Petitioner therefore respectfully urges that for the reasons above, this petition for a writ of certiorari directed to the Court of Appeals of the State of New York, should be granted.

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